



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In re Application of:

HARTMUT EICHINGER

SERIAL NO.: 09/297,237

ART UNIT: 3635

FILED: MAY 17, 1999

EXAMINER: PATRICK J. CHAVEZ

TITLE: PLAYHOUSE MADE FROM PREFABRICATED PARTS

APPEAL BRIEF

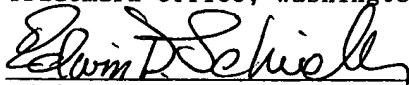
On April 1, 2002, in response to the final Office Action, dated December 20, 2001, Applicant, Appellant herein, timely appealed (including a 37 C.F.R. §1.8 first-class certificate of mailing dated March 20, 2002) from the final rejection of Claims 20-31. What follows is Appellant's Appeal Brief, filed in triplicate, with the Appeal Brief filing fee of \$160.00 (small entity), as set forth in 37 C.F.R. §1.17(f), being enclosed.

I. Real Party in Interest

(37 C.F.R. §1.92(c)(1))

Appellant and sole inventor, Hartmut Eichinger, a citizen of the Federal Republic of Germany, is the real-party-in-

I hereby certify that this paper is being deposited this date with the U.S. Postal Service as First Class Mail addressed to: Hon. Commissioner for Patents, United States Patent and Trademark Office, Washington, D.C. 20231.



Edwin D. Schindler, Reg. No. 31,459

May 31, 2002
Date

interest. The application is not assigned and Appellant has no existing obligation to assign it.

II. Related Appeals and Interferences

(37 C.F.R. §1.92(c)(2))

There are no related appeals or interferences pending.

III. Status of Claims

(37 C.F.R. §1.92(c)(3))

The above-identified patent application was filed on May 17, 1999, with Claims 1-19 (as amended via a Preliminary Amendment, filed April 26, 1999 (upon payment of the U.S. National Fee)), as constituting the entry of P.C.T. Application No. PCT/DE97/02793 into the U.S. National Phase under 35 U.S.C. §371. Appellant's P.C.T. international filing date is November 29, 1997, and Appellant's claimed date of foreign priority, pursuant to 35 U.S.C. §119, is December 5, 1996.

On September 21, 2000, the Examiner issued a first Office Action rejecting Claims 3, 9, 11, 14 and 17-19 as being indefinite, pursuant to 35 U.S.C. §112, second paragraph, and rejecting Claim 1-15 as being anticipated, pursuant to 35 U.S.C. §102(b), by Vinson, U.S. Patent No. 4,262,900, and/or as being obvious over Vinson, pursuant to 35 U.S.C. §103, and rejecting Claims 16-19 as being obvious over Vinson, taken in view of Ahrens, U.S. Patent No. 4,447,055.

On March 21, 2001, Appellant timely mailed to the PTO his "Amendment in Response to the First Office Action," pursuant to 37 C.F.R. §1.8, along with the requisite Petition for a Three-Month Extension of time for response and required extension fee. As it concerns the issues pertaining to this appeal, in his reply to the first Office Action Appellant cancelled Claims 1-19 and substituted therefor new Claims 20-31, of which Claim 20 is the single independent claim now pending in the application.

On June 5, 2001, the Examiner issued a second, and final, Office Action, which withdrew all prior grounds of rejection and issued new grounds for rejection of Claims 20-31 as being either anticipated by, or obvious over, the prior art. Specifically:

1. Claims 20, 25, 26 and 28-31 were rejected by the Examiner as being anticipated, pursuant to 35 U.S.C. §102(b), by O'Brian et al., U.S. Patent No. 4,365,799;

2. Claims 22, 23 and 27 were rejected by the Examiner as being obvious, pursuant to 35 U.S.C. §103(a), over O'Brian et al.;

3. Claim 21 was rejected by the Examiner as being obvious, pursuant to 35 U.S.C. §103(a), over O'Brian et al., taken in view of Ahrens, U.S. Patent No. 4,447,055; and,

4. Claim 24 was rejected by the Examiner as being

obvious, pursuant to 35 U.S.C. §103(a), over O'Brian et al., taken in view of Vinson, U.S. Patent No. 4,262,900.

On December 5, 2001, Appellant filed a request for a Continued Prosecution Application (along with a Petition for a Three-Month Extension of the deadline set by the final Office Action, dated June 5, 2001), and filed a substantive "Response to the Final Office Action," explaining why the applied prior art should be withdrawn and the pending claims allowed. Appellant did not further amend his claims and Claims 20-31 remained pending, without amendment, as first introduced in the Amendment, dated March 21, 2001.

On December 20, 2001, the Examiner issued a final Office Action again rejecting Claims 20-31 for the reasons set forth in the final Office Action, dated June 5, 2001.

On April 1, 2002, Appellant filed his Notice of Appeal (having a 37 C.F.R. §1.8 Certificate of Mailing dated March 20, 2002) in response to the final Office Action, dated December 20, 2001. Appellant did not file Rule 116 response to the final Office Action and, consequently, the entry of no amendments was sought under 37 C.F.R. §1.116.

The claims on appeal are, therefore, Claims 20-31, as filed in the "Amendment to the First Office Action," dated March 21, 2001.

Therefore, the status of the claims on appeal is:

Claims allowed: None

Claims objected to: None

Claims rejected: Claims 20-31

Claims cancelled: Claims 1-19

IV. Status of Amendments

(37 C.F.R. §1.192(c)(4))

No amendments under 37 C.F.R. §1.116 were filed in response to the final Office Action, dated December 20, 2002. A complete copy of the claims on appeal, as required pursuant to 37 C.F.R. §1.192(c)(9), accompanies this Appeal Brief.

V. Summary of Invention

(37 C.F.R. §1.192(c)(5))

At the outset, it should be recognized that the present invention provides a playhouse for children having supporting posts (2) with limit stops (4) or locking elements (23) and being formed as vertical plate-like bodies (7). A roof (1) affixed to the supporting posts (2) with the roof being a self-supporting slab (1) resting in a horizontal direction directly upon the supporting posts (2). In a particularly preferred embodiment, the supporting posts (2) have a length exceeding a distance as measured from the roof (1) to a floor level of the playhouse, and having a recess (3) into which said self-supporting slab (1) is capable of being inserted edgewise. The playhouse of the present invention can be

constructed quite easily, and in little time, and the elements thereof can be assembled in differing ways.

VI. Issues

(37 C.F.R. §1.192(c)(6))

The issues presented in this Appeal are as follows:

A. Claims 20, 25, 26 and 28-31 were rejected by the Examiner as being anticipated, pursuant to 35 U.S.C. §102(b), by O'Brian et al., U.S. Patent No. 4,365,799;

B. Claims 22, 23 and 27 were rejected by the Examiner as being obvious, pursuant to 35 U.S.C. §103(a), over O'Brian et al.;

C. Claim 21 was rejected by the Examiner as being obvious, pursuant to 35 U.S.C. §103(a), over O'Brian et al., taken in view of Ahrens, U.S. Patent No. 4,447,055; and,

D. Claim 24 was rejected by the Examiner as being obvious, pursuant to 35 U.S.C. §103(a), over O'Brian et al., taken in view of Vinson, U.S. Patent No. 4,262,900.

The principal prior art rejection of the final Office Action is the Examiner's rejection of independent Claim 20 (and dependent Claims 25, 26 and 28-31) as being anticipated by O'Brian et al., U.S. Patent No. 4,365,799. (The remaining claims pending in the application, being dependent claims, have been rejected as being obvious, pursuant to 35 U.S.C.

§103(a), over O'Brian et al., applied alone or as the primary reference and considered in view of a secondarily-applied citation.)

Specifically, the Examiner has rejected Claim 20, the single independent claim in the application, as being anticipated, pursuant to 35 U.S.C. §102(b), by O'Brian et al., on the contention that O'Brian et al. teaches a play structure comprising vertical plate-like supporting posts (20, 22) having vertical stops or locking elements (30, 34, 98) with recesses provided at these plug connections; a side rail (136) on the top side of the slab; and a roof (96) affixed to said supporting posts. According to the Examiner, the roof is a self-supporting slab resting in a horizontal direction. It is also the Examiner's contention that a fastening device (108) is on the base or edge of the slab in O'Brian et al. The Examiner has, therefore, concluded that, at a minimum, the claim elements recited in independent Claim 20 are all found with the O'Brian et al. patent citation.

VII. Grouping of Claims

(37 C.F.R. §1.192(c)(7))

Claim 20 is the single independent claim pending in the above-identified patent application. Because Appellant contends that O'Brian et al. neither anticipates nor renders the presently claimed invention obvious, irrespective of whether O'Brian et al. is considered alone or in combination with

additional prior art, Appellant will argue solely the anticipation rejection of independent Claim 20 in this Brief.

Accordingly, the patentability of dependent Claims 21-31 will not be separately argued, and the patentability of these claims will be allowed to stand or fall on the basis of whether independent Claim 20 is patentable.

VIII. Argument

(37 C.F.R. §1.192(c)(8))

The 35 U.S.C. §102(b) Anticipation Rejection of Independent Claim 20

In the final Office Action, the Examiner had rejected independent Claim 20 as being anticipated, pursuant to 35 U.S.C. §102(b), by O'Brian et al., U.S. Patent No. 4,365,799, with particular consideration given to the platform in FIG. 5 of O'Brian et al., designated by reference numeral "96," and whether platform 96 can be analogized to a "roof" structure for supporting an anticipation rejection of Appellant's claimed playhouse.

In reply to the Examiner's anticipation rejection applying O'Brian et al., Appellant respectfully submits that the Examiner's reading of O'Brian et al. is too narrow and not legally correct. Alternatively, the Examiner has not properly given patentable weight to all of the limitations in Appellant's claims, thereby finding that O'Brian et al. anticipates the presently claimed invention when, Appellant sub-

mits, such is not the case.

O'Brian et al. discloses a folding slide and platform structure. No playhouse, or housing structure of any kind, and no "roof" structure is either disclosed in, or suggested by, O'Brian et al. Carefully reviewing the Examiner's application of O'Brian et al., it would seem that the Examiner is viewing the platform (96) in O'Brian et al. as being the structural equivalent of "a roof affixed to said supporting posts, said roof being a self-supporting slab resting in a horizontal direction directly upon said supporting posts," as recited in Appellant's independent Claim 20. Had Appellant simply recited a "horizontal surface" on supporting posts, then Appellant could agree with the Examiner that the platform" in O'Brian et al. could be seen as being structurally equivalent to the "roof" in Appellant's invention, so as to support an anticipation rejection of Appellant's claims, however, the pending claims recite a "roof," which is a narrower limitation than the platform in O'Brian et al. and cannot reasonably be viewed as the same structure.

"During patent examination the pending claims must be interpreted as broadly as their terms reasonably allow. When the applicant states the meaning that the claim terms are intended to have, the claims are examined with that meaning, in order to achieve a complete exploration of the applicant's invention and its relation to the prior art." In re Zletz,

893 F.2d 319, 321, 13 USPQ2d 1320, 1322 (Fed. Cir. 1989) (emphasis added). See, also, DeGeorge v. Bernier, 768 F.2d 1318, 1322, 226 USPQ 758, 761 n. 2 (Fed. Cir. 1985) ("Claims during prosecution, reissue and reexamination are also given the broadest reasonable interpretation possible, consistent with the specification.") (emphasis added).

Appellant respectfully contends that the Examiner's interpretation of his pending claims, and the application of O'Brian et al. to those claims, is neither reasonable nor consistent with either Appellant's Specification or that of O'Brian et al. Appellant's Specification and claims recites a playhouse having a "roof" structure. O'Brian et al. discloses a "folding slide and platform structure." Platform (96) in O'Brian et al. is a support for children prior to using the slide disclosed therein. The crossbars (136) in O'Brian et al. are taught as being "two handrails." Nothing in O'Brian et al. discloses, suggests or hints at the possibility of the platform (96) being in any way analogous to that of a "roof" structure, which would be capable of supporting a finding that, perhaps, Appellant's claims did "read on" the prior art of O'Brian et al. Nothing suggests that the structure of O'Brian et al. can be used as a playhouse. Quite the contrary: Slide (82) and the ladder-like treads (100) of the ladder leading up to the platform (96) in O'Brian et al. (see, FIG. 5) effectively preclude the structure disclosed in O'Brian et al. as being a playhouse and, thus, preclude plat-

form (96) as also serving as a "roof," as recited in Appellant's claims.

Had the structure disclosed in O'Brian et al. been a combination slide and playhouse, where it is reasonable to find that the platform also functioned as a roof for the playhouse beneath, then Appellant could agree with the Examiner. Such, however, is not what O'Brian et al. teaches!

Appellant would appear to fully understand the Examiner's application of O'Brian et al., as well as the Examiner's interpretation of the law concerning anticipation, and the fact structures disclosing all limitations, even taken from non-analogous technical fields, may be applied in a 35 U.S.C. §102 anticipation rejection, however, the art applied in an anticipation rejection must nevertheless reasonably disclose all limitations recited in the claims under examination. O'Brian et al. does not reasonably disclose a "roof" structure, which Appellant's claims do recite as part of the presently claimed invention. The slide element and express teaching in O'Brian et al., that surface (96) is a "platform" with two handrails (136), undermine the Examiner's apparent contention that the platform (96) can also be viewed as a "roof" as recited in Appellant's claims.

Appellant is mindful of the law regarding anticipation and, Appellant respectfully submits, that the Examiner's application of the relevant law is not correct. Some affirma-

tive disclosure in O'Brian et al. must indicate that platform 96 may be viewed as a "roof" structure by children or, at the very least, that children can occupy the area below platform 96 in the "normal" course of play. The Examiner's contention he could imagine children seeking shelter or playing under platform 96, but that the play structure disclosed by O'Brian et al. is "not a housing structure in the traditional sense" (Final Office Action, Page 3, lines 6-12), is simply insufficient to support a reading of O'Brian et al. which could find platform 96 to be a "roof." Something more than the Examiner's creativity and imagination is required to exist in the prior art to support the stated anticipation rejection which applies O'Brian et al.

Further, the fact that platform 96, in combination with ladder-like treads 100, is intended to support children who stand on this platform, rather than occupy a space underneath it, would support a finding that O'Brian et al. teaches against the presently claimed invention, precisely because no "roof" structure is found in the O'Brian et al. play structure and the platform (96), cited by the Examiner, cannot readily be transformed into a "roof," since it has a distinct function which is contrary to the Examiner's suggestion.

In view of the foregoing, Appellant respectfully contends that O'Brian et al. neither anticipates, nor is capable of rendering obvious, the present invention, as claimed.

Accordingly, Appellant respectfully requests that the Board reverse the Examiner's 35 U.S.C. §102(b) anticipation rejection applying O'Brian et al. against independent Claim 20, and proceed to allow Claims 20-31.

IX. Summary

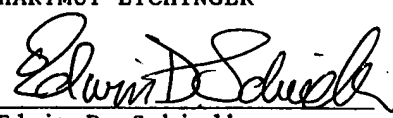
In summation, it is respectfully contended that all claims now pending in the above-identified patent application (i.e., Claims 20-31) recite a novel playhouse and versatile for children, having a slab structure for a roof and supporting posts formed as vertical plate-like bodies, which is patentably distinguishable over the prior art.

Accordingly, reversal of the Examiner's final rejection, pursuant to 35 U.S.C. §102(b), and the allowance of all pending claims are respectfully requested and earnestly solicited.

Respectfully submitted,

HARTMUT EICHINGER

By


Edwin D. Schindler
Attorney for Appellant
Reg. No. 31,459

Five Hirsch Avenue
P. O. Box 966
Coram, New York 11727-0966
(631)474-5373
May 31, 2002

- Enc.: 1. Appendix - Claims on Appeal; and,
2. Check for \$160.00 (small entity) for filing Appeal Brief.

The Commissioner is hereby authorized to charge the Deposit Account of Appellant's Attorney, Account No. 19-0450, for any additional fees which may be due in connection with the prosecution of the present application, but which have not otherwise been provided for.